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No. 86-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNIVERSAL CITY STUDIOS, INC.,

Petitioner,

—against—

NINTENDO CO., LTD. AND NINTENDO OF AMERICA INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

In entering judgment on respondents' counterclaims for tortious interference with contract under state law, the district court made extensive findings of fact concerning petitioner's willfully tortious conduct. This conduct included a systematic program of falsely claiming to respondents' licensees that their licensed products infringed on sweeping rights in King Kong claimed by petitioner. Petitioner's program was successful to the extent that several of these licensees breached their contracts with respondents. Petitioner had explicitly concluded before embarking on this program that it did not have the rights which it asserted to respondent Nintendo and its licensees.

As well as awarding respondents compensatory damages for petitioner's tortious interference with contract, the district court awarded an amount equal to a portion of the actual attorney's fees expended by respondents in defending against petitioner's infringement allegations. The district court cited as alternative bases for this additional award: 1) state common law granting discretion to award exemplary damages for petitioner's willful tort; 2) section 35 of the Lanham Act, 15 U.S.C. § 1117, granting discretion to award fees in "exceptional cases", and 3) Rule 11 of the Federal Rules of Civil Procedure.

The Court of Appeals for the Second Circuit unanimously held that the lower court's findings of willful tortious interference were amply supported by the record. In affirming the award equal to respondents' attorney's fees, the Court of Appeals held that the district court did not abuse its discretion in awarding these fees in this "exceptional case" under the Lanham Act. It did not reach the district court's two alternative bases for the award.

In view of the factual record of this case and the broad legal bases for the judgment below, the questions sought to be presented by petitioner should be restated:

1. Whether it was an abuse of discretion, after finding that petitioner acted in bad faith by asserting rights in this lawsuit it knew it did not have and

by willfully interfering with respondents' contractual licensees, to award an amount equal to a portion of respondents' actual attorney's fees as alternatively: 1) exemplary damages under state law; 2) under section 35 of the Lanham Act; and 3) pursuant to Rule 11 of the Federal Rules of Civil Procedure.

2. Whether it was error for the Court of Appeals to affirm the district court's judgment for the tort of contractual interference without explicitly citing in its opinion an inapposite state case and theory advanced by petitioner for the first time on appeal concerning the limitations under state law of the different tort of malicious prosecution.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Nintendo Co., Ltd. and Nintendo of America Inc. (collectively "Nintendo"),[1] submit this Brief in Opposition to the Petition for a Writ of Certiorari to the

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1. Pursuant to Rule 28.1 of this Court's rules, respondents state that Nintendo of America Inc. is a wholly–owned subsidiary of Nintendo Co., Ltd. and that there are no other affiliates or subsidiaries, other than wholly–owned subsidiaries, of either of the respondents.

United States Court of Appeals for the Second Circuit of petitioner, Universal City Studios, Inc. ("Universal").

COUNTER-STATEMENT OF THE CASE

Universal's statement of the case repeatedly ignores the record evidence and misstates the opinions of the district court and the Court of Appeals for the Second Circuit. This Court is respectfully referred to the opinions below for an accurate statement of the case. The district court's opinion is reproduced at A65. The Court of Appeal's opinion is reproduced at A1. Following the affirmance by the Court of Appeals, Universal did not seek a rehearing or a stay of execution of the judgment. After the mandate issued from the Court of Appeals, Universal satisfied the entire judgment.

REASONS TO DENY THE WRIT

In seeking this writ, Universal ignores or misstates the district court's factual findings based on a full trial. Although the district court and the Court of Appeals did not use the word frivolous to define Universal's claims and actions in this litigation, they found something far worse — that Universal instituted this lawsuit and threatened Nintendo's licensees with litigation in subjective bad faith. The district court further found that it did not believe the testimony of Universal's executives who at trial attempted to counter the direct evidence of bad faith. In order to review any of the issues which Universal advances as reasons for granting the writ, this Court would have to find that the district court's detailed and considered findings of fact were clearly erroneous. This fact–bound litigation is inappropriate for review by this Court.

In its first and second questions Universal asks this Court to review the lower court's award of an amount equal to respondent's attorney's fees in defending against Universal's bad faith lawsuit. It ignores the fact that this award was granted on an extensive record developed in a full trial and was awarded on alternative legal grounds as: 1) exemplary damages under state law; 2) Rule 11 of the Federal Rules of

Civil Procedure; and 3) an award of fees based on section 35 of the Lanham Act. Universal would have this Court carve out the Lanham Act basis of the award for review without reference to the factual record on which the district court exercised its discretion to make its award or the other two alternative legal bases of decision.

Although the Court of Appeals found it unnecessary to reach the district court's alternative legal bases under Rule 11 and state law, its affirmance of the district court's judgment is equally appropriate on these alternative legal grounds which would sustain the judgment in this Court. A writ of certiorari would bring before this Court, therefore, not only the facts found and affirmed by the lower courts on an extensive record, but also the district court's exercise of discretion under state law and Fed. R. Civ. P. 11, as well as the Lanham Act. *See Thigpen v. Roberts*, 468 U.S. 27, 30 (1984) ("[W]e may affirm on any ground that the law and the record permit and that will not expand the relief granted below."); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (prevailing party may "defend his judgment on any ground properly raised below whether or not that ground was relied upon, rejected or even considered by the District Court or Court of Appeals").

Under the facts and circumstances of this case, the district court's exercise of discretion and the unanimous affirmance of the Court of Appeals were well founded on all three bases of decision. Where there are independent bases for decision, Universal's attempt to raise Lanham Act issues in its first and second questions, which need never be reached to affirm the judgment below, is inappropriate. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation").

Universal's third question presented, concerning the lower courts' interpretations of state law, is equally without merit and undeserving of this Court's attention. As best it can be

understood, Universal seeks to have this Court consider establishing a novel principle as the state law of New York, or, in the alternative, to consider whether a Court of Appeals must cite in its opinion affirming a district court's decision under state law each and every case and argument advanced by an appellant no matter how frivolous.

A. THE SUBJECTIVE BAD FAITH FOUND BY THE DISTRICT JUDGE MAKES THIS CASE INAPPROPRIATE FOR REVIEW BY THIS COURT

In its petition, Universal largely fails to address the factual findings of the district court.[2] The damages and fees awarded to Nintendo did not, as Universal claims, arise out of "collateral sanctions litigation" (Univ. Pet. at 2–3, 14–16); rather, they arose from a judgment for Nintendo after a full bench trial on its counterclaim for tortious interference with licensing contracts. Universal argues that the lower courts impermissibly held for Nintendo without finding the litigation "frivolous or without foundation." In fact, the district court found that Universal was in subjective bad faith when it instituted this lawsuit against Nintendo and threatened Nintendo's licensees with litigation causing many of them to breach their contracts. A107–09, 112. The record, thoughtfully analyzed by the district judge, fully supported this finding.

The evidence demonstrated that barely two weeks before Universal began its assault on Nintendo's licensees, claiming

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2. Universal's petition also fails to call to this Court's attention two important opinions of the district court. In a memorandum opinion dated September 16, 1985, the district court resolved Universal's objections to a proposed judgment submitted by Nintendo. This opinion is reproduced in Nintendo's appendix at A180. The district court also rendered an opinion on November 24, 1985, denying Universal's request for a new trial or alternatively for a hearing pursuant to Rule 11 of the Federal Rules of Civil Procedure. This opinion is reproduced in Nintendo's appendix at A183. As set forth below, each of these omitted opinions further weaken the petition.

sweeping rights in King Kong, it had explicitly concluded in consultation with its licensing and legal departments that it had **no** rights in King Kong to license. A75–76. Documents produced from Universal's own files corroborated the fact that Universal always knew that any rights it might claim in King Kong were drastically limited. A86, 107–09. Nevertheless, in order to make its claim appear credible, Universal asserted in its threats to Nintendo's licensees and in its complaint in this action that it was the exclusive owner of virtually all rights in King Kong. Despite this false claim of sweeping rights, Universal could never tell the district court or Nintendo and its licensees "exactly what shred of the King Kong property it owned." A107. The lower courts found that Universal in bad faith asserted rights in King Kong which it knew it did not have. A8–9, 13, 107–09, 112.

In an attempt to rebut this "wide array" of direct evidence of its subjective bad faith (A11), key Universal executives, including its president, testified at the trial on Nintendo's counterclaims. The district court, after hearing these witnesses — all of whom are lawyers — and judging their credibility, did not believe their explanations as to their beliefs concerning Universal's rights in King Kong and their motives in bringing this lawsuit and threatening Nintendo's licensees. A76, 78. The district court concluded that Universal had tortiously interfered with Nintendo's licensees "in order to join in the profits from Donkey Kong rather than to vindicate a legitimate claim to a trademark." A107. The district court's findings of subjective bad faith were affirmed by a unanimous panel of the Court of Appeals for the Second Circuit. A9, 12.

Universal makes no effort to rebut the factual record of its subjective bad faith in this petition. It asserts instead that it should not have been held liable because its alleged acquisition of rights from the *RKO* lawsuit was a fair ground for litigation and because it claimed to have received advice of counsel before commencing the lawsuit. Univ. Pet. at 2, 23–24. Both

of these arguments were rejected by the lower courts as unsupported by the facts.

Universal presents a distorted version of the 1976 *RKO* litigation which involved the ownership of rights in King Kong. It claims that the Cooper Judgment vested "all rights" to King Kong in Richard Cooper and that this judgment, when assigned to Universal, gave it all rights to King Kong, including trademark rights. Univ. Pet. at 5–7. In fact, Universal initiated the *RKO* litigation seeking a declaration that it could produce a King Kong motion picture remake free from any claim of exclusive rights by RKO. In the California federal district court, Universal succeeded in obtaining a judicial declaration that the King Kong story was in the public domain, and that King Kong could not be a trademark because there was no evidence of secondary meaning and because it had become part of the ordinary English language. A3–4.[3] Hence, the court made clear that the Cooper Judgment, which was entered concurrently with the judgment for Universal that King Kong could not be a trademark, did not affect the Universal judgment and therefore did not create trademark rights that could be enforced against the world. A3–5.

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3. The *RKO* litigation was settled years later while on appeal and Universal's declaratory judgment was vacated on stipulation. However, as the Court of Appeals below held:

> The fact that the parties in the RKO suit subsequently settled their dispute and vacated the district court's judgment does not alter the underlying fact that Universal's contention of law was approved by a federal court. The holding in the case involves not an application of judicial estoppel, which would completely bar a party from arguing an inconsistent position in subsequent litigation . . . , but only an inference as to the parties belief in the merits of its subsequent lawsuit.

A9, n.3.

Despite the undisputed history and context of the Cooper Judgment, Universal tries to tell this Court that the California federal court intended to vest trademark rights by the Cooper Judgment and that the decisions of the lower courts here "had the net effect of rendering the core provisions of the prior federal court judgment a nullity." Univ. Pet. at 4. The district court and the Court of Appeals below were not fooled by this aberrant analysis. Since all of the judgments in the *RKO* litigation were premised on and subordinate to Universal's victory in establishing that no such rights existed, the Court of Appeals after a careful analysis of the *RKO* record, held "[i]t is clear . . . that Cooper did not hold any trademark rights against the world in King Kong. Any such rights that might exist would be solely against RKO." A5.

Similarly, Universal's attempted reliance on the advice of counsel defense is not supported by the record and was correctly found not to have been established by both the district court and the Court of Appeals. In order to establish such a defense, Universal would have had to prove that it "relied in good faith after first making full disclosure of facts that are relevant to the advice." *United States v. Eisenstein*, 731 F.2d 1540, 1543–44 (11th Cir. 1984). *See also Draney v. Wilson, Morton, Assaf & McElligott*, 592 F. Supp. 9, 11 (D. Ariz. 1984). Universal did not call Stephen Kroft, the attorney on whom it purported to rely, as a witness at trial. A11, 78.[4] Rather, it chose to attempt to establish the defense through the

4. This is not surprising, since Mr. Kroft was the same attorney who had handled the *RKO* litigation for Universal where he had proved that King Kong could not be a trademark for anyone. As stated by the Second Circuit, "[i]ndeed, it would have been interesting to hear [Kroft] explain the consistency of any advice to Universal that it had trademark rights with his statements to the California district court on this point." A11.

hearsay testimony of Robert Hadl, the head of Universal's litigation department. A187.[5] Mr. Hadl testified that he asked Mr. Kroft to play Donkey Kong and that Mr. Kroft subsequently reported back that he had played the game and thought Universal had a claim. A77.

As found by the district court, "Hadl and Kroft did not discuss Universal's rights in King Kong or King Kong merchandising . . . . There was no amplification or justification of Kroft's alleged statement that Universal had a claim or any analysis of the merits of the professed claim." A77–78. The district court found that Mr. Hadl's testimony utterly failed to establish the required elements of the advice of counsel defense and concluded that "[t]he totality of the circumstances here show that whatever advice of counsel Universal received, it was insufficient to identify a cognizable right approaching that asserted in the complaint. . . ." A108.[6]

Universal would have this Court review certain of the legal conclusions of the lower courts in a vacuum. However, the district court's factual findings as to the subjective bad faith of Universal in instituting this lawsuit and threatening Nintendo's licensees were the foundation for the court's conclusions of law and award of damages and attorney's fees

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5. Subsequent to the district court's opinion rejecting Universal's advice of counsel defense, Universal belatedly sought to introduce Mr. Kroft's testimony concerning his advice by way of an affidavit submitted in connection with a motion for new trial. In denying that motion, the district judge, who had previously found, after considering all the record evidence, that Mr. Hadl's hearsay testimony was insufficient to establish the defense, analyzed Mr. Kroft's affidavit and concluded that "the Kroft affidavit, taken at face value, does not establish by itself that a different result would have obtained" had Kroft testified at trial." A189.

6. In addition, because of Mr. Kroft's continuing association with Universal and his close involvement in the *RKO* litigation, the district court inferred from his absence that his testimony would have been unfavorable to Universal. A78. The Second Circuit found that the district court was fully justified in drawing this adverse inference. A11.

to Nintendo. Review of any of the legal issues raised by Universal's petition would require this Court to re–examine the extensive record, conduct a full review of the facts found by the district court and, before granting any relief, conclude initially that the district court's detailed findings of fact are so clearly erroneous that this Court " 'is left with the definite and firm conviction that a mistake has been committed.' " *Anderson v. City of Bessemer*, _____ U.S. _____, 105 S.Ct. 1504, 1511 (1985)(quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). This fact–bound litigation, replete with findings of subjective bad faith and improper conduct by Universal, does not clearly present the issues raised by Universal and is a most inappropriate context within which to instruct the lower federal courts to halt the "proliferation of unjustified 'sanctions' claims." Univ. Pet. at 23.

B. EVEN IF THE LANHAM ACT WERE THE SOLE BASIS OF DECISION BELOW, UNIVERSAL'S PETITION WOULD IMPROPERLY REQUIRE THIS COURT TO REVIEW THE EXTENSIVE FACTUAL RECORD ON WHICH THE LANHAM ACT ISSUES WERE CORRECTLY DECIDED.

1. *The Court Below Found The Lawsuit Was Brought In Willful Bad Faith And That This Case Was Therefore "Exceptional" Within The Meaning Of The Lanham Act*

In its attempt to put this case before this Court, Universal focuses on only one of the three grounds which support the award below and argues that the lower courts did not make the requisite findings to support the conclusion that this case was "exceptional" under Section 35 of the Lanham Act (15 U.S.C. § 1117) so as to justify an award of attorney's fees. Thus, Universal argues that there were no findings that its claims were "unfounded" or "frivolous"; hence, it was an abuse of discretion to find this case to be "exceptional". Univ.

Pet. at 18–21.[7] This argument is nonsensical in view of the record below.

This was not a case where there was an assertion of questionable rights which was later found to be objectively frivolous. There was direct evidence of Universal's subjective bad faith in asserting rights it knew it did not have. A8–9, 13, 107–09, 112. Universal falsely claimed to own *all* trademark rights in King Kong at the outset of this litigation but was then unable to delineate what this trademark consisted of during more than three years of litigation while it pursued Nintendo's licensees. A6, 79, 84–85, 107. Further, Universal's witnesses testified unbelievably in an attempt to cover up Universal's scheme to use this litigation not to vindicate a legitimate claim of right in King Kong, but to profit from the property of another. A9–10, 76, 78, 112–13. The Court of Appeals unanimously found these findings to be fully supported by the record. A8–9. By any reasonable construction of Section 35, this was an "exceptional" case where the claims asserted were not only frivolous, but outright falsehoods.

Universal cites *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant*, 771 F.2d 521 (D.C. Cir.), *rehearing en banc denied*, 774 F.2d 1180 (1985) and suggests that the decisions

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7. Universal's request that this Court announce a rule requiring a finding that a litigant's claims be "frivolous" or "unfounded" stands in sharp contrast to Universal's argument to the district court. In its Supplemental Trial Brief Universal stated:

> To make out a claim of bad faith litigation for purposes of recovering attorney's fees under 15 U.S.C. § 1117, Nintendo has to prove that Universal commenced and maintained this litigation other than to vindicate a legal right in King Kong.

After trial, the district court found that Nintendo had proved precisely what Universal itself acknowledged was required for an award of Lanham Act attorney's fees — that Universal had commenced and maintained this litigation in bad faith to serve ulterior business motives. A112.

of the district court and Court of Appeals below are in conflict with *Noxell* in that the *Noxell* court awarded "Section 35 fees to a Lanham Act defendant only after a painstaking analysis demonstrating that the plaintiff had disregarded controlling precedent from this Court . . . ." Univ. Pet. at 19. In fact, the circumstances of this case where Universal was found after a full trial to have acted in outright bad faith are far more extreme than those presented in *Noxell*, where the court in reviewing a motion to dismiss for improper venue, held:

> Congress did not intend rigidly to limit recovery of fees by a defendant to the rare case in which a court finds that the plaintiff "acted in bad faith, vexatiously, wantonly, or for oppressive reasons" . . . . Something less than "bad faith," we believe, suffices to mark a case as exceptional.
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> * * *
>
> We find in this case more than a hint of "economic coercion" . . . in Noxell's choice of a distant forum and in its mode of proceeding . . . . We think it altogether "exceptional" . . . for Noxell to launch litigation . . . at a place far removed from California when a Supreme Court decision precisely in point . . . plainly declared the impropriety of that course.

771 F.2d at 526–27.

The *Noxell* court recognized not only that attorney's fees are recoverable under Section 35 of the Lanham Act when bad faith is shown, but also that in certain instances a recovery is permissible even if bad faith has not been proven. In this case, Universal's bad faith motives were laid bare by direct evidence educed in a full trial. The award of attorney's fees

not only does not conflict with the decision in *Noxell*, but *Noxell* stands for the proposition in this case *a fortiori*.[8]

Ultimately, Universal's petition would require a review of the factual record on which the district court found this case to be "exceptional". In view of the overwhelming factual record of Universal's bad faith and considering this Court's admonitions that due deference be given to a district court's findings of fact and credibility, the Court of Appeals unanimously affirmed the district court's findings of willful bad faith. A8–9. Universal's attempt to seek further review in this Court of these factual findings which the Court of Appeals found to be firmly grounded in the trial record is wholly inappropriate. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"), *cited with approval in Texas v. Mead*, 465 U.S. 1041, 1043 (1984).

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8. Similarly, Universal's attempt to create some reviewable issue by relying on decisions involving the Patent Act fails. In both cases cited by Universal, the courts recognized that proof of bad faith would render a case "exceptional" for purposes of 35 U.S.C. § 285. *See Stevenson v. Sears, Roebuck & Co.*, 713 F.2d 705, 713 (Fed.Cir. 1983) (The Federal Circuit, construing Section 285 of the Patent Act, stated: "a patentee should not be automatically penalized for pursuing an infringement action after a determination of invalidity in another suit. There must be some finding of unfairness, bad faith or inequitable conduct on the part of the unsuccessful patentee . . . . The trial judge made no finding that any of these exceptional circumstances were present here . . . .") (citations omitted); *Arbrook Inc. v. American Hospital Supply Corp.*, 645 F.2d 273, 279 (5th Cir. 1981) (The Court of Appeals stated that fee awards under Section 285 are proper "when the plaintiff had acquired his patent by fraud or brings an infringement suit with no good faith belief that his patent is valid and infringed.") Moreover, Universal's attempt to imply that its conduct does not fall within the language of *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604, 612 (7th Cir. 1986)(frivolousness or "even a more demanding standard" is necessary for a fee award pursuant to Section 35 of the Lanham Act)(Univ. Pet. at 20, n.18) is absurd in view of the overwhelming proof of its subjective bad faith.

2. *No Authority of This or Any Other Court Justifies Further Review Of The Amount Of The Award.*

Universal also seeks to have this Court review the extensive factual record to determine independently whether the amount awarded Nintendo as a result of Universal's conduct was justified. Attempting to present a reviewable issue, Universal argues that the lower courts made no finding that the award under Section 35 of the Lanham Act was reasonable. Univ. Pet. at 21–22.[9] In advancing its argument, Universal again ignores the findings below which support the Lanham Act award and the two alternative and independent grounds on which the district court relied in granting the award.

Universal thus does not challenge the reasonableness of the alternative award of exemplary damages for Universal's tortious conduct under state law — conduct which consisted of a systematic assault on Nintendo's licensing program leading many of Nintendo's licensees to breach their agreements. This alternative award of exemplary damages was in an amount equal to Nintendo's attorney's fees, and was explicitly found, as required under state law, to bear a reasonable relationship both to the harm inflicted and the flagrancy of Universal's conduct. A110. Although the appellate court did not reach this ground, the amount of the award is fully

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9. Although before this Court Universal attempts to attach great significance to this alleged error, it is apparent that Universal did not give much weight to this argument in the lower courts. Universal did not challenge the reasonableness of the fees claimed by Nintendo at any time during the trial. After trial, in its formal Notice of the Objection to the Proposed Judgment, Universal made no mention of any objection to the award on the grounds of reasonableness, even though it had referred to such an objection in earlier correspondence to the court. On appeal, Universal did not directly brief this objection to the fee award; rather, it merely raised the issue in a footnote.

justified under the facts and circumstances of this case. *See Whitney v. Citibank*, 782 F.2d 1106 (2d Cir. 1986); *Aldrich v. Thomson McKinnon Securities Inc.*, 756 F.2d 243 (2d Cir. 1985).[10]

Similarly unchallenged is the award made by the district court pursuant to Fed. R. Civ. P. 11. After finding that Universal had acted in clear bad faith in filing this lawsuit and had used this lawsuit as an improper means to profit on Nintendo's trademark, the district court awarded Nintendo an amount equal to its attorney's fees expended in defending against Universal's claims. A112–13. Again, although not reached by the appellate court, the award of attorney's fees pursuant to Rule 11 provides another independent ground for Nintendo's judgment. Given the two independent alternative grounds for the award of attorney's fees, this Court need never reach the only issue sought to be presented here for review — the reasonableness of the fee award under the Lanham Act.

Finally, the district court did not abuse its discretion in determining the amount of the award under any of the three bases for the award. The award was made by a district court judge who was fully familiar with the proceedings which ultimately led to the dismissal of Universal's claims. The district court judge had reviewed the extensive summary judgment papers submitted by Nintendo following the close of discovery, and, in a detailed opinion, dismissed Universal's Lanham Act complaint. Following Universal's unsuccessful first appeal to the Court of Appeals for the Second Circuit, the same district court judge scrutinized the initial record and proceedings, this time in the context of a full trial on respondents' counterclaims in which he heard evidence from Universal's witnesses, judged

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10. The appellate court did, however, reach and uphold an award of exemplary damages in an amount equal to costs which were not included as attorney's fees, but which were disbursed by respondents in defending against Universal's Lanham Act claim. A12–13.

their credibility and assessed the damages to Nintendo. In a second carefully reasoned opinion, the district court judge granted in part and denied in part Nintendo's counterclaims and, citing the Lanham Act as one alternative basis, awarded respondents reimbursement of certain of their attorney's fees actually expended in defending against Universal's bad faith claims.

The amount of the fees awarded bore a direct relationship to the results achieved and was the subject of unchallenged testimony. At trial, Nintendo presented direct testimony of the amount of attorney's fees which it had paid in defending against Universal's claims. Nintendo specifically excluded from this amount the fees expended in presenting its counterclaims and even the fees expended in establishing the exceptional nature of this case, the very grounds which led to the award. Universal not only chose not to cross–examine Nintendo's witness on this point, but decided against challenging at any time during the trial the evidence presented regarding Nintendo's fees. Based on the uncross–examined trial testimony and the exceptional nature of the case, the district court specifically found that the amount awarded was reasonable.[11] The appellate court, finding that the district court had not abused its discretion, upheld the award.

Universal's reliance on the rulings of this Court and other lower courts in an attempt to create a reviewable issue is unavailing.[12] Unlike the Supreme Court and court of appeals

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11. The district court judge further considered his determination of reasonableness after the original opinion. Nintendo had sought clarification of the court's opinion, arguing that it should be awarded an amount equal to its attorney's fees as exemplary damages and a similar additional amount under the Lanham Act. The court rejected this request, stating that "[r]ecovery of the amount of attorney's fees under either theory will make Nintendo whole and compensate it for the damages suffered." A181.

12. The prior rulings of this Court on which Universal relies have no bearing on this case. Rather, they deal with the unique standards for award-

decisions cited by Universal (Univ. Pet. at 22), the district court here did not grant respondents an increased fee award or grant an award for fees incurred in connection with claims on which Nintendo did not prevail or grant an award for fees incurred in connection with related claims on which Nintendo did prevail. Instead, fully familiar with the substantive and procedural history of the case, the court awarded Nintendo the amount of fees which were actually paid in successfully defending against the very claims which were found to be without merit. Given the unique facts and circumstances of this case, and the unchallenged alternative and independent grounds for the award, Universal has presented no issue requiring review by this Court.

C. UNIVERSAL'S ATTEMPT TO RAISE A REVIEWABLE ISSUE CONCERNING THE APPLICATION OF STATE LAW IS FRIVOLOUS

On a fully developed record, the district court found that Universal, in bad faith, threatened Nintendo's licensees, causing them to breach their licensing contracts with Nintendo. A106–09. The district court correctly set forth the law of tortious interference with contract in New York, and, in a careful analysis of the facts, found that each of the elements of this state law tort was present. A104, 106–09.

In the district court Universal did not argue the novel proposition that causes of action stated under the state tort of malicious prosecution or abuse of process were the only permissible actions under New York law to redress the injuries

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ing attorney's fees under 42 U.S.C. § 1988. Universal attempts to treat the statutory authorization for attorney's fees under the Lanham Act under the same standards required by Section 1988, a statute with a markedly different legislative history and public purpose, which encourages prosecution of civil rights actions by private attorney generals and which does not require a specific finding that a case is exceptional before awarding fees, but instead presumes that fees will be awarded to prevailing parties.

inflicted by Universal. This argument and the case of *Curiano v. Suozzi*, 63 N.Y.2d 113, 480 N.Y.S.2d 466, 469 N.E.2d 1324 (1984) were raised by Universal for the first time in its second appeal to the Court of Appeals.

Universal's argument concerning the effect of the *Curiano* decision on New York's common law of tortious interference and Nintendo's responding argument were the subject of full briefing and oral argument in the Court of Appeals. The Court of Appeals correctly concluded that "it is clear that under New York law litigation or the threat of litigation can give rise to a claim for tortious interference with contractual relations." A8. However, because the Court of Appeals did not ultimately cite the *Curiano* case in its decision, Universal now requests, in effect, that this Court engage in speculation as to whether the Court of Appeals sufficiently considered Universal's argument based on *Curiano*.

The *Curiano* decision was obviously disregarded by the Court of Appeals since it is totally inapposite. *Curiano* defines the tort of malicious prosecution; it does not deal with the state tort of interference with contract — the tort with which Universal was charged and found guilty by the district court. As both the district court and the Court of Appeals found, all the elements of this tort were clearly established under state law. A7–11, 106–09. Nintendo's suit was not, as Universal contends, based on the simple fact that Universal filed this bad faith action. It was based on the fact that before and after the filing of this action, Universal systematically pursued Nintendo's licensees and caused them to breach their licensing agreements through a false claim of rights and threats of baseless litigation.

Universal is correct that the public policy of New York scrupulously requires specific elements to establish the tort of malicious prosecution to safeguard open access to the courts. But where threats of bad faith litigation and the courts are used to commit other torts such as fraud or tortious interference, those torts stand on their own footing. *See*

Guard–Life Corp. v. S. Parker Hardware Mfg. Co., 50 N.Y.2d 183, 191, 428 N.Y.S.2d 628, 632, 406 N.E.2d 445, 449 (1980). Indeed the threat of bad faith litigation causing a party to breach his contract with another is the classic scenario from which the tort of interference with contractual relations sprang. *See* Restatement (Second) of Torts § 767, Comment on Clause (a) ("prosecution of civil suits"). *See also Zilg v. Prentice–Hall, Inc.*, 717 F.2d 671 (2d Cir. 1983), *cert. denied*, 466 U.S. 938 (1984).[13]

Universal's argument that the Court of Appeal's decision raises reviewable issues in this Court because it did not cite the *Curiano* decision boils down to a request that this Court impose an absurd rule requiring federal courts, when applying state law, to discuss and distinguish every case from the highest state court cited by the litigants regardless of its inapplicability or the lack of merit of the litigant's argument. Alternatively, Universal would have this Court go far beyond the *Curiano* decision and announce sweeping new principles of New York tort law. A writ of certiorari addressed to either alternative would be wholly inappropriate.

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13. This is not a case, as Universal suggests, where state law is enjoining access to the federal courts or penalizing the assertion of federal claims. Univ. Pet. at 25, n.22. Because of Universal's bad faith invocation of the jurisdiction of a federal court, it was assessed attorney's fees pursuant to two independent federal bases, Section 35 of the Lanham Act and Rule 11 of the Federal Rules of Civil Procedure. Thus, Universal's liability for tortious interference with Nintendo's licenses and the award of an amount equal to Nintendo's attorney's fees as exemplary damages based on Universal's willful commission of this tort constitute no more a penalty for the assertion of federal claims than the federal bases relied on by the district court. Further, Universal's access to the federal court was in no sense enjoined. Its claims were fully considered and dismissed on the merits.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition of Universal City Studios, Inc. for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Dated: November 10, 1986

Respectfully submitted,

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APPENDIX

MEMORANDUM OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 82 Civ. 4259 (RWS)
September 16, 1985

UNIVERSAL CITY STUDIOS, INC.,

Plaintiff,

–v.–

NINTENDO CO., LTD. and NINTENDO OF AMERICA, INC.,

Defendants.

SWEET, D.J.

On August 22, 1985, defendants Nintendo Co., Ltd. and Nintendo of America, Inc. (collectively "Nintendo") noticed settlement on August 26 of a proposed judgment arising out of the opinion of this court filed on July 29, 1985 (the "opinion"). Prior counsel for plaintiff Universal City Studios, Inc. ("Universal") was relieved following the entry of the opinion, and on August 23, new counsel sought to stay entry of judgment. This application was granted to the extent of permitting the filing of additional papers in opposition to the

proposed judgment by August 30, with the understanding that no judgment would be entered during this period.

Letters from counsel for Nintendo dated August 1 and 12 and from counsel for Universal dated August 9 have been reviewed, as well as affidavits from both parties and the memorandum in opposition to the proposed judgment submitted by counsel for Universal. Upon these materials and all prior proceedings, the issues raised in connection with the proposed judgment will be resolved as set forth below, and judgment will be entered.

The principal dispute arises out of the language of the opinion at page 48:

> The award of attorney's fees pursuant to § 1117 provides an additional basis for granting Nintendo its attorney's fees for the successful defense of the Lanham Act claim but should not provide a double recovery.

In other words, the opinion specified two alternative grounds for granting a single award equal to Nintendo's attorney's fees (1) a punitive damages award on the tortious interference claim in the amount of Nintendo's attorney's fees incurred in defending Universal's infringement action, and (2) an award of attorney's fees under § 1117 of the Lanham Act. Recovery of the amount of attorney's fees under either theory will make Nintendo whole and compensate it for the damages suffered.

The amount of attorney's fees was the subject of unchallenged testimony. There is no basis in the record upon which to base the present objection as to the reasonableness of the fee.

Objection has also been made to the inclusion of $228,752.68 as costs in this portion of the award. While out–

of–pocket costs are an appropriate element of the punitive damages award, there is less basis, and no authority cited, for including out–of–pocket costs under § 1117 which refers only to attorney's fees. Of course, it is often said that it is discretionary with the court to award taxable court costs. Therefore, the judgment should set forth Nintendo's taxable costs for defending against Universal's Lanham Act claim. Any of Nintendo's $228,752.68 in out–of–pocket costs which are not properly taxable should be included in the judgment as an element of the punitive damages award.

With respect to the costs and attorney's fees of Nintendo for prosecuting the contributory copyright infringement counterclaim, Universal's objections are based on the ground that the costs and fees set forth in the Kirby affidavit are unreasonable. 17 U.S.C. § 505. The objection is based solely on the relationship between the fees and the damage recovery, the former exceeding the latter by almost 150%. For the reasons stated in the opinion and the particular circumstances presented in this litigation, the cited ratio of fee to recovery is reasonable. Therefore, the judgment will award Nintendo attorney's fees and court costs incurred in prosecuting the copyright infringement counterclaim.

Enter judgment on notice in accordance with the opinion as clarified, hopefully, by this memorandum opinion.

IT IS SO ORDERED.

DATED: New York, New York
September 16, 1985

/s/ROBERT W. SWEET
ROBERT W. SWEET
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 82 Civ. 4259 (RWS)
November 24, 1985

UNIVERSAL CITY STUDIOS, INC.,
Plaintiff,

–v.–

NINTENDO CO., LTD. and NINTENDO OF AMERICA, INC.,
Defendants.

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SWEET, D.J.

Plaintiff/counterclaim defendant Universal City Studios, Inc. ("Universal") has brought a motion pursuant to Rule 59(a), Fed. R. Civ. P., for a partial new trial in the interests of substantial justice. Alternatively, Universal moves pursuant to Rule 11, Fed. R. Civ. P., for a hearing to determine whether Universal is entitled to recover attorneys' fees incurred in defending against defendant Nintendo Co., Ltd. and Nintendo of America, Inc. (collectively, "Nintendo") counterclaims for misappropriation of property and unjust enrichment. Nintendo opposes these motions and further seeks Rule 11 sanctions against Universal for filing the present motions. For the following reasons, Universal's motions will be denied, and Nintendo's cross–motion will be denied.

Prior Proceedings

In April, 1982, Universal initiated this action against Nintendo claiming that by Nintendo's use of a gorilla in its Donkey Kong game, Nintendo had violated Universal's King Kong rights under Section 43(a) of the Lanham Act, section 368–d of the New York General Business Law, and state common law. On cross–motions for summary judgment, Nintendo's defenses to Universal's claims of infringement were upheld, and the complaint was dismissed. 578 F. Supp. 911 (S.D.N.Y. 1983). On appeal, the grant of summary judgment was upheld on the ground that there was no likelihood of confusion between Donkey Kong and King Kong. 746 F.2d 112 (2d Cir. 1984). Familiarity with those opinions is assumed.

The parties continued with discovery on the unresolved Nintendo counterclaims of misappropriation, unjust enrichment, tortious interference and vicarious infringement of copyright. Following a bench trial conducted from May 20 to May 28, 1985, by opinion dated July 29, 1985, Nintendo's counterclaim for unjust enrichment was denied while its counterclaims for vicarious copyright infringement and tortious interference with contractual relations were granted. Attorneys' fees expended by Nintendo were awarded on alternative grounds, as punitive damages; under 17 U.S.C. § 505; under 15 U.S.C. § 1117; and under Fed. R. Civ. P. 11. Following the filing of the July 29 opinion and the ensuing judgment, the instant rule 59(a) and Rule 11 motions were made.

Discussion

The principal issue raised by Universal's motion for a partial new trial pursuant to Rule 59 is whether it would be in the interests of "substantial justice" to permit Universal to introduce the testimony of Stephen A. Kroft, Esq. ("Kroft"), a member of the California bar, and one of Universal's primary legal advisors both in litigation matters generally and in this particular action. Kroft was never called to testify in opposition to Nintendo's counterclaims and was, as his affidavit on this motion demonstrates, "stunned" by the court's findings in the July 29 opinion. The central issue on which his testimony would have been relevant was whether Universal initiated this action in "good faith."

The July 29 opinion held that a determination of Universal's good faith depended on the totality of the circumstances regarding Universal's reliance on advice of counsel and not the mere fact that an affirmative legal opinion was rendered. *See* July 29 opinion at 44. In evaluating the totality of the circumstances, it was deemed pertinent that: "whatever advice of counsel Universal received, it was insufficient to identify a cognizable right approaching that asserted in the

complaint and was proffered without research or memoranda analyzing the claim." *Id.* In addition, a number of facts were found relative to the good faith issue, particularly Universal's termination of the King Kong licensing program, and the conduct of the licensing of the Tiger game.

Universal now urges that because "it had no reason to anticipate" that Kroft's basis for his opinion was relevant it has suffered prejudice on the basis of "unfair surprise." *Cf. Conway v. Chemical Lehman Tank Lines, Inc.*, 687 F.2d 108, 111–12 (5th Cir. 1982).

In its memorandum in support of this motion, Universal cites the summation by its trial counsel where Universal had argued the advise of counsel issue:

> So the court is clear on what we are arguing: in the context and circumstances of this case, Universal had an absolute right to rely on Mr. Kroft's advice. Whether the advice was good advice or bad advice is not the issue. The issue is did Universal have a right to rely on that advice in the context of this case and the point is I think the answer is self–evident. The man was the litigation counsel for Universal and he had handled that proceeding in 1975 and 1976 and by the time the decision was taken whether he looked into those things thoroughly or he did not look into them thoroughly he knew enough to bring the lawsuit, enough to advise on the lawsuit.

As Universal recognized, this legal position was vigorously opposed by Nintendo's assertion that a "totality of the circumstances" analysis of good faith was the more appropriate standard. The case law setting forth this standard was, of course, amply cited by Nintendo at trial. *See Central Soya Company, Inc. v. George A. Humel & Co.*, 723 F.2d 1573,

1577 (Fed. Civ. 1983). *See also Rea v. Wichita Mortgage Corp.*, 747 F.2d 567, 576 (10th Cir. 1984); *Securities and Exchange Commission v. Savoy Industries, Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir.1981). Moreover, the totality of the circumstances standard is closely related to the basic requirement that the party asserting the good faith defense must demonstrate that its reliance was accompanied by a full disclosure of all facts that are relevant to the advice required. *See Securities and Exchange Commission v. Mauro Nursing Center, Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972). Such a standard contemplates a good faith exchange of information and advice between client and counsel and fully comports with the realities of the relationship between sophisticated corporate officers, such as those of Universal, and their outside attorneys, such as Kroft. Finally, the totality of the circumstances approach prevents a mere pretextual assertion of good faith.

All of the relevant legal authorities on this issue were fully addressed by competent counsel at trial. Thus, Universal's claim of prejudice can be distilled down to its assertion that it had "no way" of knowing that Kroft's analysis of the legal issues and his understanding of the factual basis underlying those issues would be considered by the court as one of the relevant aspects of the totality of the circumstances and further that testimony on that subject would in all likelihood produce a different result.

However, Universal was well aware of the central importance of Kroft since it had interjected his alleged advice as a good faith defense and presented hearsay testimony by Hadl regarding the communications between himself and Kroft. Immediately after Universal rested its defense without calling Kroft, Nintendo explicitly requested the court to draw a negative inference from Kroft's absence, and no change of position was taken by Universal at that time. Now Universal concedes by affidavit that, after due deliberation, it chose as a tactical litigation decision to rely solely on Hadl's testimony in

conjunction with the "good faith" reliance on advice on counsel defense.

Under these circumstances, Universal's request for a partial new trial must be denied, for it "appears that [plaintiffs] motion is grounded on a contention available to every defeated plaintiff — that it could not have foreseen that the district court would reject its claim without the testimony of the absent witness." *Hoyt R. Matise Co. v. Żurn*, 754 F.2d 560, 568 n.16 (5th Cir. 1985). *See also Cathedral Estates, Inc. v. Taft Realty Corp.*, 228 F.2d 85, 89 (2d Cir. 1955); *General Electric Co. v. Minneapolis Honeywell Regulator Co.*, 35 F. Supp. 35, 36 (E.D.N.Y. 1940). To reach such a conclusion in no way impugns Kroft's affidavit as to his advice or activities. It is not now proper to speculate as to whether such testimony would have produced a different factual finding.

Whatever interests Universal may have in reopening the trial are far outweighed by interests of justice in preserving the integrity of the trial process. In the course of this trial, Universal's witnesses were excluded from the courtroom specifically because credibility was a central element of the good faith defense. Now that Universal has received a detailed blueprint of the court's deliberation, as embodied by the July 29 opinion, it seeks to add new evidence on a critical aspect of the finding in order to overturn the judgment or perhaps to sharpen the issues to be presented on appeal. The reopening of trial would in this case result in substantial advantage for Universal and would make it impossible to obtain a fresh determination of Kroft's testimony as it relates to the totality of the circumstances. Therefore, Universal's motion for a partial new trial will be denied.

In addition, first, Kroft's knowledge and understanding of Universal's Lanham Act and unfair competition claims would not necessarily alter this court's findings regarding the motives of and statements by Universal's officials as set forth

in the July 29 opinion. Although Kroft refers to a draft memorandum prepared on or about April 23, 1982, it was not sent to Hadl or anyone else at Universal, but simply discussed informally in a telephone conversation. While never finalized, the memorandum or its sequelae recognized the very serious problem to Universal with respect to the secondary meaning issue underlying its alleged Lanham Act claim. In any case, the Kroft affidavit, taken at face value, does not establish by itself that a different result would have obtained.

While Universal's present motion must be denied in the interests of finality, it is not so frivolous as to justify the Rule 11 sanctions sought by Nintendo on its cross-motion. Given the serious nature of the circumstances underlying the judgment in this action and the magnitude of the award, Universal's motion has been brought in good faith.

Universal by its Rule 11 motion seeks attorney's fees for its defeat of Nintendo's infringement claims. Again perhaps this is done more to etch appellate issues than to provide practical relief. In any case, the motion is unavailing. There is no factual showing now available to Universal or offered at trial to satisfy the burden of establishing a lack of good faith as set forth by the authorities cited in the July 29 opinion. Not every successful defense will result in attorneys' fees, only those which establish unusual facts to demonstrate that a lack of good faith in the initiation of the claim. Nintendo established such facts in the view of the court. Universal did not.

The motions of Universal and Nintendo are denied and the judgment will not be vacated.

IT IS SO ORDERED.

Dated: New York, New York
November 24, 1985

/s/ROBERT W. SWEET
ROBERT W. SWEET
U.S.D.J.